83-773

Office-Supreme Court, U.S.
FILED
NOV 7 1983
ALEXANDER L. STEVAS,
CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OREGON,

Petitioner,

v.

MICHAEL JAMES ELSTAD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
***JAMES E. MOUNTAIN, JR.**
Solicitor General
VIRGINIA L. LINDER
Assistant Attorney General
100 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Does the Self-Incrimination Clause of the Fifth Amendment require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier admission from the defendant without advising him of his rights, even though the trial court found that the earlier admission was otherwise voluntary, and that it did not "taint" the subsequent confession?

TABLE OF CONTENTS

Page

Question Presented i

Petition for Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ

The rule of federal constitutional law announced by the Oregon Court of Appeals is in direct conflict with that applied in the same circumstances by federal courts. The Oregon Court of Appeals opinion marks a departure from reasoned analysis and announces a rule which fails to effectuate the values protected by the Fifth Amendment while exacting a high price to legitimate law enforcement. For these reasons, review by this Court is warranted. 8

Conclusion 18

Appendix A App-1

Appendix B App-7

TABLE OF AUTHORITIES

Page

Cases Cited

Brown v. Illinois, 422 U.S. 590 (1975) 16
Clewis v. Texas, 386 U.S. 707 (1967) 12
Dunaway v. New York, 442 U.S. 200 (1979) 16
Knott v. Howard, 511 F.2d 1060 (1st Cir. 1975) 14
Michigan v. Long, ___ U.S. ___, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983) 8
Michigan v. Tucker, 417 U.S. 433 (1974) 16-17
Miranda v. Arizona, 384 U.S. 436 (1966) ..... passim
State v. Lloyd, 22 Or. App. 254, 538 P.2d 1278 (1975) 5-6
United States v. Bayer, 331 U.S. 532 (1947) ..... passim
United States v. Knight, 395 F.2d 971 (2nd Cir. 1968) 14
United States v. Toral, 536 F.2d 893 (9th Cir. 1976) 14-15
Westover v. United States, 384 U.S. 436 (1966) 12
Wong Sun v. United States, 371 U.S. 471 (1963) 5,7

Constitutional Provisions

U.S. Const., Amend. V ..... passim
U.S. Const., Amend. VI 5
U.S. Const., Amend. XIV 2

Statutory Provisions

28 U.S.C. § 1257(3) 1
Or. Rev. Statutes 133.683 5

PETITION FOR WRIT OF CERTIORARI

The State of Oregon respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion entered by the Oregon Court of Appeals in *State of Oregon v. Michael James Elstad*, No. A24659 (February 16, 1983).

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing defendant Elstad's burglary conviction (Appendix A, below) is reported at 61 Or. App. 673, 658 P.2d 552 (1983). The order of the Supreme Court of the State of Oregon denying the State's petition for discretionary review of the decision of the Court of Appeals (Appendix B, below) is reported at 295 Or. 617, ___ P.2d ___ (1983).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The opinion of the Oregon Court of Appeals was entered on February 16, 1983. The Supreme Court of Oregon denied a timely petition for discretionary review on September 7, 1983. This petition for writ of certiorari was filed within the 60-day period prescribed by Rule 20, as time is computed under Rules 28 and 29.

CONSTITUTIONAL PROVISIONS INVOLVED

The resolution of the question presented in this

case involves the Self-Incrimination Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

United States Constitution, Amendment V provides in pertinent part:

> "No person shall * * * be compelled in any criminal case to be a witness against himself * * *."

United States Constitution, Amendment XIV provides in pertinent part:

> "Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT OF THE CASE

A. Summary of Facts

On the afternoon of December 17, 1981, police officers Burke and McAllister went to the residence of defendant Elstad's parents with a warrant for defendant's arrest. Defendant's mother permitted them in and showed them to defendant's bedroom where defendant was lying on his bed, partially dressed, listening to the stereo. (Tr. 63-64, 74). At the officers' request, he dressed and went into the living room. Officer McAllister stepped into the nearby kitchen with defendant's mother to explain the situation, while Officer Burke stayed in the living room with defendant. (Tr. 64, 74).

Both officers considered defendant to be under arrest at this point, although defendant was not told he was under arrest. (Tr. 74, 82). Officer Burke stayed with defendant in the living room, and defendant sat down on the sofa. (Tr. 74-75, 82). Burke sat down with defendant and asked him if he knew why the officers were there. Defendant said he did not. The officer inquired whether defendant knew Mr. Gross or the Gross family. Defendant said he did. Defendant also said that he had heard there had been a robbery at the Gross house. Burke replied that he thought defendant was involved in the burglary, and asked defendant what he knew about it. Defendant responded, "I was there." (Tr. 83-84). Burke did not ask any further questions of defendant at that time, nor did he otherwise attempt to clarify the nature or extent of defendant's participation in the crime, if any.

Defendant was placed in the patrol car, and one of the officers explained bail procedures to defendant's mother. Defendant's father arrived home at that time. After talking to police, he became agitated with his son, went to the patrol car, and began to reprimand defendant. Officer Burke intervened and had defendant's father move away from the car. (Tr. 75-76).

The officers did not question defendant about the burglary during the ride to the police station. (Tr.

78). They were required to respond to a possible crime, and a third officer who met them at the scene transported defendant to the police station. (Tr. 87). The two arresting officers joined defendant at the police station approximately 45 to 60 minutes later, and they and defendant then went to Officer McAllister's office. (Tr. 66, 87). McAllister advised defendant of his rights by reading from a standard *Miranda* rights card. (Tr. 66; Ex. 6). McAllister asked defendant if he understood the rights, and defendant answered affirmatively. (Tr. 76). It appeared to Officer McAllister that defendant in fact understood his rights. (Tr. 67). Both McAllister and defendant signed the *Miranda* rights card. (Tr. 66).

Defendant indicated he was willing to talk to the officers, and he gave a statement describing what occurred on December 11, the date of the burglary. Officer McAllister typed the statement as defendant gave it orally. The statement was taken at 4:45 p.m. (Tr. 66, 77). After McAllister typed the statement, defendant reviewed it. McAllister also read it back to defendant. (Tr. 69). Inaccuracies, such as typographical errors and misspellings, were corrected and initialed by defendant, and defendant signed the two-page statement. (Tr. 70, 77). In it, defendant told who was involved in the burglary, what information he gave others about the premises, what he

was paid for information about the residence and who paid him, and the extent of his involvement in aiding the entry. (Ex. 5). No threats or promises were made to defendant either at defendant's residence or at the police station when defendant gave his statement. (Tr. 68, 69, 78).

B. Procedural History: Raising and Preserving of the Federal Question

At trial, defendant moved to suppress his oral and written statements to police, on both state and federal constitutional grounds. In his written motion, he asserted that his oral statements, made before *Miranda* warnings, violated the Fifth and Sixth Amendments of the United States Constitution as interpreted by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). Although Oregon courts have never fashioned a warning requirement from the parallel self-incrimination provision of the Oregon Constitution, defendant nevertheless urged that that failure of police to advise him of his *Miranda* rights also violated the Oregon Constitution. Defendant next urged that his written confession should be suppressed as a "fruit of the poisonous tree." Defendant relied on *Wong Sun v. United States*, 371 U.S. 471 (1963), an inapplicable Oregon statute (Or. Rev. Statutes 133.683 applying to searches and seizures) and an Oregon Court of Appeals case, *State v. Lloyd*,

22 Or. App. 254, 538 P.2d 1278 (1975), decided on federal grounds.

The state did not introduce or otherwise seek to use defendant's initial oral statement, made prior to the *Miranda* warnings. (Tr. 92). The trial court considered the question of the admissibility of the pre-*Miranda* statement only in order to determine the nature of the illegality, if any, that arguably tainted the subsequent written confession (Exhibit #5). In denying defendant's motion to suppress, the trial court made the following findings and conclusions:

> "THE COURT: I'm going to deny the motion to suppress Exhibit #5 for these reasons: I'm of the view that the statements made by the defendant at the house in response to the officer's question: 'What do you know about the robbery?' must be suppressed. It would not be admissible because this man was not advised of his Miranda warnings, his Constitutional rights.
>
> "However, the statement taken at the jail would be admissible because the evidence shows that there was no taint between the first statement 'I was there' and the second. I have not seen the contents of the second statement, but assuming that there is incrimination [sic] evidence, statements in that written document, that would be admissible.
>
> "There was a break in the events from 45 to 50 minutes away from the courthouse and being transported by the police officer, and I think the taint — there's no showing of any taint whatsoever.
>
> "There is a showing by the State that the statements were made freely and voluntarily.

> The rights card is in evidence. The officer read the rights to him. They are numbered one through seven. They appear on Exhibit #6, and on the reverse side is the question: 'Do you understand these rights?' And the word y-e-h appears after that, which I assume is yes. 'Do you have any questions about your rights?' Answer: 'No.' 'Having these rights in mind, do you wish to talk to us now?' And it says, 'Y-e-h, I do.'
>
> "And I find that the State has established that the statement was given freely and voluntarily and knowingly and will not suppress Exhibit #5." (Tr. 91-92)

Thus, the trial court found defendant's initial statements unlawful only on the basis of *Miranda v. Arizona*, *supra*, and federal Fifth Amendment grounds. The trial court concluded, however, that this illegality did not taint the subsequent confession.

In challenging the trial court's ruling on appeal in the Oregon Court of Appeals, defendant relied only on federal cases and state cases applying federal law. Defendant argued that his initial statement was unlawfully elicited under *Miranda v. Arizona, supra* and state cases decided thereunder. Relying on *Wong Sun v. United States, supra, United States v. Bayer*, 331 U.S. 532 (1947), and state cases applying the federal "fruit of the poisonous tree" doctrine, defendant urged that his written confession was a product of his first, unlawfully obtained statement, and that therefore it must be suppressed.

The court of appeals held that the trial court erred in refusing to suppress defendant's written confession. The court concluded, as a matter of law, that the police action in obtaining an admission from defendant in violation of *Miranda* exerted a coercive impact on defendant's later confession, despite the fact that the subsequent confession was preceded by *Miranda* advice and a waiver of rights.[1] 61 Or. App. 673, 678, 658 P.2d 552, 555.

REASONS FOR GRANTING THE WRIT

The rule of federal constitutional law announced by the Oregon Court of Appeals is in direct conflict with that applied in the same circumstances by federal courts. The Oregon Court of Appeals' opinion marks a departure from reasoned analysis. It announces a rule which fails to effectuate the values protected by the Fifth Amendment and exacts a high price from legitimate law enforcement. For these reasons, review by this Court is warranted.

In this case, defendant, while at his parent's residence, made an initial admission to police in which he stated, "I was there," in response to a police officer's inquiry of what defendant knew about a particular burglary. Defendant did not

---

[1]Even if there were some doubt whether the Oregon Court of Appeals decided the issue purely or primarily on federal constitutional grounds, and we submit there should be none, that doubt should be resolved in favor of this Court's jurisdiction. *Michigan v. Long*, ___ U.S. ___, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983).

claim, and the courts below did not hold, that the police conduct at the time he made the statement was actually coercive or that his statement was involuntary in fact. Rather, the statement was inadmissible exclusively because of the failure of police to give *Miranda* warnings to defendant before he made this limited admission.

The police thereafter transported defendant to the police station for booking and, prior to asking defendant any potentially incriminating questions, one of the arresting officers fully advised defendant of his *Miranda* rights. Defendant said that he understood those rights and that he was willing to waive them and give a statement. He signed a waiver card, and gave the police a two-page confession describing the extent of his involvement in the burglary.

The facts demonstrate unequivocally that when defendant gave his written confession to police, the illegality which infected his initial statement had been fully removed. The procedural failure to give the prophylactic *Miranda* advisal was the only circumstance which rendered the first statement inadmissible. That circumstance was not present when defendant gave the second, full-blown confession. Nevertheless, the Oregon Court of Appeals suppressed defendant's written confession. The court held that at the time defendant gave that confession

to police, the "cat was out of the bag." This fact, the Court of Appeals concluded, was sufficient, in and of itself, to "taint" the second statement and render it inadmissible.

The Court of Appeals' reasoning is flawed. Although the court was quick to seize upon the "cat out of the bag" language of *United States v. Bayer*, 331 U.S. 532 (1947), it was equally quick to forget what this Court said in *Bayer* on the issue of whether a subsequently obtained confession is inadmissible merely by virtue of the psychological consequence of a prior confession:

> "Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as a fruit of the first. *But this court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one, after those conditions have been removed.*" *Id.* 331 U.S. at 540-541. (Emphasis added).

This Court thus refused in *Bayer* to adopt an inflexible rule that any initial inadmissible statement which "lets the cat out of the bag" and thereby places defendant at the disadvantage of having disclosed his "secret," automatically taints a later confession. Rather, a subsequent confession is admissible if it is made after the conditions which

precluded the use of the first statement have been removed.

The Court of Appeals subtly, yet significantly, misdirected the analysis in this case by shifting the focus from the effect of the prior illegality to the effect of the prior admission:

> "* * * [T]he coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make the subsequent confession admissible. In determining whether it has been dissipated, lapse of time and change of place from the original surroundings are the most important considerations. * * *" 61 Or. App. at 677, 658 P.2d at 554. (Citations omitted).

This reasoning misses the point. The essential premise of the "cat out of the bag" doctrine is the recognition that a defendant is never free of the consequence of having made the initial statement. The psychological disadvantage that flows from the fact of a prior admission does not go away. The cat, to whatever extent it gets out of the bag, does not go back in. It is illogical to suggest that a lapse of time or change in circumstance lessens the psychological effect that follows when a suspect has let some or all of the "secret out." The suspect has made a statement to police, and he knows it. He is not going to forget what he said to the authorities merely because police move him to a new location for further questioning, because a different officer questions

him, or because additional questioning is delayed several hours or several days.

The Court of Appeals borrows the analysis which considers a change of place or lapse of time from cases involving initial statements made under circumstances that contained elements of actual duress or coercion. *See e.g., Westover v. United States*, 384 U.S. 436 (1966); *Clewis v. Texas*, 386 U.S. 707 (1967). In that context, lapse of time or change of circumstances logically should be considered, because such facts bear on whether the *conditions* which rendered the first statement inadmissible have been removed, not because the psychological *effect* of having made the prior statement is dissipated by those circumstances. It makes obvious sense to consider the passage of time, change of place, and so on in the context of an initial confession which is the product of an overborne will. There, the concern is with restoring the suspect's ability to choose voluntarily whether to talk. Removing the suspect from the conditions that impermissibly intimidate and pressure him to speak, and allowing time for him to rest, reflect, or reevaluate, serves to insulate the suspect psychologically from the coercive circumstances and thus to "break the stream of [illegal] events." *Cf. Clewis v. Texas, supra*, 386 U.S. at 710.

The illegal condition here was not actual duress. Rather, defendant's initial statement was held

inadmissible only because the police had failed to follow *Miranda* procedural safeguards. When, at the police station, the officer carefully advised defendant of his *Miranda* rights and ensured that he understood those rights before asking him if he would give a statement, defendant effectively was removed from the circumstances that rendered the prior statement inadmissible. A further change in the place of questioning, or longer delay before resumption of questioning, would have done nothing to dissipate the "taint" of the procedural failure to give the *Miranda* advice. To require police, under these circumstances, to postpone questioning or to resume the questioning through a different officer would serve no meaningful purpose. Ultimately, to impose such requirements could be counterproductive, because of the concern and confusion that might be felt by a suspect who is needlessly shuffled between officers and settings, and who is detained for questioning for a longer period of time than might otherwise be necessary.

Moreover, defendant's initial statement, "I was there," was not a confession, fully acknowledging his guilt of a burglary of which the police had not yet accused him. It was, at most, an admission which indeed tended to incriminate defendant, but only when coupled with other information with which the police had not yet confronted him. The psychological

impact of such an admission upon a subsequent confession is clearly less than that contemplated by *Bayer*'s "cat out of the bag" metaphor.

Several lower federal courts, confronted with substantially similar facts, have concluded that the giving of *Miranda* warnings is sufficient to remove the "taint" of the unlawfulness attached to a prior confession, where there was no police coercion involved in eliciting the prior confession and the only "illegality" was the procedural failure to give warnings. *See e.g., Knott v. Howard*, 511 F.2d 1060, 1061 (1st Cir. 1975); *United States v. Knight*, 395 F.2d 971, 973 (2nd Cir. 1968); *United States v. Toral*, 536 F.2d 893, 897 (9th Cir. 1976). The following portion of the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Toral, supra*, is particularly instructive:

> "* * * [T]he proper inquiry is whether the conditions that rendered the pre-warning admissions inadmissible carried over to invalidate appellant's subsequent confession. * * * In the present case appellant's initial statements were rendered involuntary almost exclusively because of the failure of police to give him the *Miranda* warnings. There was very little that was inherently coercive about the circumstances leading up to the admissions by appellant either before or after the warnings were given. All of the questioning took place in the security of appellant's own home, * * * and the initial questioning, though improper, was in the form of preliminary questions that may have been asked of anyone in order to narrow the field of suspects. Unlike [the cases cited by appellant], the record before us

> reveals no coercive atmosphere that was carried over after the *Miranda* warnings were given.
>
> We do not suggest that the impact of the confession itself should be minimized. Under other circumstances, a prior *involuntary* confession standing alone may be enough to render involuntary a confession made after the *Miranda* warnings are given. In the circumstances of the present case, however, we cannot say that the impact of the prior statements was so great as to render appellant's confession involuntary." 536 F.2d at 896-897. (Citations omitted; emphasis added).

Although the Oregon Court of Appeals was urged to follow the Ninth Circuit's analysis, the Oregon appellate court refused to distinguish between the "taint" which attaches to a coerced confession, and that which attaches to a statement elicited unlawfully under the *Miranda* rule. The court likewise refused to distinguish between incriminating admissions and full-blown confessions in evaluating the extent of the "taint" which such statements may have upon subsequent confessions. The Oregon court rejected these arguments and said that to draw such distinctions "denigrates" the importance of the *Miranda* decision and the evil it was designed to prevent. 61 Or. App. at 677, 658 P.2d at 554. The issue in this case, however, is the admissibility of the second confession, not the admissibility of defendant's pre-warning admission. The *Miranda* decision's concern is with the potential for coercion inherent in custody, and it expressly prescribed the

now familiar set of warnings as a satisfactory means to attenuate that evil. To refuse, as the Oregon appellate court refuses, meaningfully to consider the giving of *Miranda* warnings in assessing whether defendant's second confession was admissible is to denigrate the importance of those warnings and to reduce them to a hollow procedural ritual.

This Court has recognized that there is a significant difference between police conduct which directly infringes upon the right against compulsory self-incrimination and conduct which violates only the prophylactic rules developed to protect that right. *See Michigan v. Tucker*, 417 U.S. 433, 439, 444 (1974). Thus, although this Court has not squarely addressed the issue presented in this case, the suggestion has been made that where the prior illegality does not implicate Fourth Amendment concerns or directly infringe on the right against compulsory self-incrimination, the giving of proper *Miranda* warnings may be adequate to insulate a subsequent confession for Fifth Amendment purposes. *See Michigan v. Tucker*, *supra*, 417 U.S. at 448-450; *Brown v. Illinois*, 422 U.S. 590, 601-603 (1975); *Dunaway v. New York*, 442 U.S. 200, 216-217 (1979). The Oregon Court of Appeals lost sight of its constitutional objective in this case. It forgot that "[c]ases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion,

since that clause provides only that a person shall not be *compelled* to give evidence against himself." *Michigan v. Tucker*, *supra*, 417 U.S. at 448, (emphasis original). The result of the Oregon court's misanalysis is a rule of exclusion that extends far beyond the *Miranda* decision and its rationale.

The concurring judge in this case wrote separately to observe:

> "I regret the introduction of the metaphor of an escaping feline ("the cat out of the bag") into our legal lexicon. I recognize that it is a piece of literary cleverness from relatively ancient judicial roots (*United States v. Bayer*, 331 US 532, 540, 67 S Ct 1394, 91 L Ed 1564 (1947)), but mere age does not make it worthy. The fact is that we have used the metaphor as a short-hand description of a particular psychological phenomenon—a prisoner's lowered resistance to confessing a second time, once a first confession has been given—to the extent that we now seem to think that this phenomenon must occur in every case. The metaphor now rules where analysis was once sovereign. However, the overthrow occurred too long ago for a dissent to serve any purpose now, so I concur." 61 Or. App. at 678, 658 P.2d at 555.

The concurrence is only half correct. True, the metaphor now rules where analysis was once sovereign, but that is not a consequence of Justice Jackson's opinion in *United States v. Bayer*, *supra*. The overthrow of analysis has been accomplished by the Oregon court. Human conduct is fueled by a vast range of motivations, and a defendant's confession may stem as much or more from remorse, a hope for

lenient treatment, a need to appease a parent or other family member, or some other concern. In most cases, as in this case, defendants do not take the stand to explain their motivations. Although the fact of a prior admission may have the psychological effect of lowering a suspect's resistence to remain silent, the *Bayer* opinion expressly disavowed that this alone should render unlawful a subsequent confession. Yet this psychological assumption alone results in the suppression of defendant's written confession in this case. The effect of the Oregon rule, as the concurring judge observes (61 Or. App. at 679, 658 P.2d at 555), is that a suspect who responds to pre-advisal questioning is thereby forever immunized from later effectively waiving his right to remain silent. Any subsequent statement is *per se* tainted and inadmissible. There is no constitutional justification for imposing this high cost on the legitimate activities of law enforcement.

CONCLUSION

The decision of the Oregon appellate court is a clear departure from the analytic principles announced by this Court, and the result is plainly wrong. This decision directly conflicts with the rule followed by the lower federal courts, including those in the Ninth Circuit within which Oregon lies. Law enforcement officers in Oregon therefore are held to two conflicting standards in attempting to comply

with the Fifth Amendment, and Oregon citizens receive different protection from a single principle of federal constitutional law, depending on whether they find themselves in federal or state court. That result is neither rational nor fair. The Court should take this occasion to clarify the place of the "cat out of the bag" reasoning in the context of the taint that attaches to an admission which violates only the procedural rules of *Miranda*.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
VIRGINIA L. LINDER
Assistant Attorney General
Counsel for Petitioners

Appendix A

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent,
v.
MICHAEL JAMES ELSTAD,
Appellant.
(29500; CA A24659)

Appeal from Circuit Court, Polk County.

Darrell J. Williams, Judge.

Argued and submitted October 13, 1982.

Stephen J. Williams, Deputy Public Defender, Salem, argued the cause for appellant. With him on the brief was Gary D. Babcock, Public Defender, Salem.

Virginia L. Linder, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and William F. Gary, Solicitor General, Salem.

Before Gillette, Presiding Judge, and Warden and Young, Judges.

WARDEN, J.

Reversed and remanded for new trial.

Gillette, P. J., concurring.

WARDEN, J.

Defendant appeals his conviction for burglary in the first degree. He assigns as error the trial court's denial of his motion to suppress a written confession, claiming that a prior, unconstitutionally obtained confession "let the cat out of the bag," *United States v. Bayer,* 331 US 532, 540, 67 S Ct 1394, 91 L Ed 1654 (1947), and tainted the subsequent confession, under the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States,* 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963). We reverse.

On December 17, 1981, officers McAllister and Burke went to defendant's home with a warrant for his arrest. His mother admitted the officers and directed them to defendant's bedroom. Both officers stayed in the bedroom while defendant dressed. He was not told that he was under arrest. Burke then took him to the living room, while McAllister went into the kitchen with defendant's mother. Burke testified:

> "I sat down with [the defendant] and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told [the defendant] that I felt he was involved in that, and he looked at me and stated, 'Yes, I was there.'"[1]

After this conversation, defendant was placed in the officers' patrol car for transportation to the Polk County jail. On their way, the officers responded to a report of a robbery, and defendant was transported to the jail in another police car. Forty-five minutes to an hour elapsed before McAllister and Burke arrived at the jail. Defendant was then informed for the first time of his rights under *Miranda v. Arizona,* 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966). He gave an oral confession; it was typewritten by McAllister as it was spoken. He then signed the two-page confession which is the subject of his motion to suppress. Burke, McAllister and defendant were the only persons present when the confession was given.

---

[1] On cross-examination, Burke testified, "And I asked what he knew about the burglary, and he said, 'I was there.'"

The state does not dispute that the statement elicited from defendant at his home was inadmissible. Our inquiry here is whether there was a sufficient break in the stream of events between that inadmissible statement and the written confession to insulate the latter statement from the effect of what went before. *Clewis v. Texas,* 386 US 707, 87 S Ct 1338, 18 L Ed 2d 423 (1967); *State v. Mendacino,* 288 Or 231, 603 P2d 1376 (1979).

In *State v. Hibdon,* 57 Or App 509, 645 P2d 580 (1982), police also were in possession of an arrest warrant when they went to the defendant's girlfriend's house to arrest him. Suspecting that the defendant was hiding in the bedroom, an officer entered the room and flushed him from beneath the bed by pointing a gun at the bed and ordering him to come out. The defendant gave inculpatory responses to a question asked by the officer. He was then placed in a patrol car, read his *Miranda* rights and transported to the police station, where, after being advised of his *Miranda* rights a second time, he confessed. The full confession was made less than one hour after the prior statement. We stated:

> "The taint of the police misconduct in questioning defendant before administering the *Miranda* warnings was not removed by the brief span of time and the change of his location from [defendant's girlfriend's] apartment to the police station, notwithstanding the fact that he had received *Miranda* warnings in the meantime." 57 Or App at 512.

We held that the confession should have been suppressed.

The state here attempts to distinguish *Hibdon* in two ways. First, it describes the circumstances leading up to the initial confession in *Hibdon* as involving "significant elements of threat and compulsion" in that the officer pointed his gun at the defendant and told him to "come out or be shot," whereas this case involves no such threat or compulsion but 'just a procedural failure to give *Miranda* warnings." The state argues that the absence of actual compulsion should be a factor in determining if there was a sufficient break in the stream of events to insulate a defendant psychologically from the effect of the coercive circumstances. The state's argument derives some support

from *State v. Mendacino, supra*. There, the initial confession was inadmissible because the interrogating officers persisted in questioning the defendant after he indicated that he did not want to talk and wanted a lawyer, circumstances that, the court noted, made the initial confession "partake more of actual coercion." 288 Or at 238.

Conceding that the flagrancy of police misconduct is a factor in another "fruit of the poisonous tree" context[2] and that it may be a factor in the analysis of the "total circumstances of each case" that we must make in these successive interrogation cases, *State v. Mendacino, supra*, 288 Or at 238, we disagree that it is a factor of sufficient significance to distinguish this case from *Hibdon*. The state's analysis denigrates the importance of *Miranda v. Arizona, supra*, in which the court held that the warnings were mandatory in order to protect Fifth Amendment rights against "the compulsion inherent in custodial surroundings." 384 US at 458. Regardless of the absence of actual compulsion, the coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible. In determining whether it has been dissipated, lapse of time and change of place from the original surroundings are the most important considerations. *See Westover v. United States*, 384 US 436, 496, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

In *State v. Mendacino, supra*, the court stated that an interval of seventy-two hours might be adequate insulation, but was not in that case, given other factors, including that the defendant remained in custody without an opportunity to consult an attorney and that the same two officers who had elicited the original confessions were present at the subsequent interrogation. Both of those considerations are present in this case. For these reasons, we do not find the absence of actual threats and compulsion sufficient to distinguish this case from *Hibdon*.

The state also argues that the nature of the disclosure in the initial statement distinguishes this case from

[2] In determining whether a confession is the fruit of a prior illegal *arrest*, the flagrancy of the police misconduct in making the arrest is a factor to be considered. *Brown v. Illinois*, 422 US 590, 603-604, 95 S Ct 2254, 45 L Ed 2d 416 (1975).

Hibdon. Here, the state suggests, the cat was only "peeking" out of the bag, *State v. Foster*, 40 Or App 635, 640, 596 P2d 572 (1979), *rev'd* 288 Or 649, 607 P2d 173 (1980), whereas in *Hibdon* the defendant in his initial statement admitted to theft by possession of stolen property, if not to the burglary for which he was being arrested. Here, when the officer inquired about a burglary at a certain house, defendant merely stated, "I was there." That statement may not literally have admitted complicity in the burglary, but given the manner in which the questioning officer put the inquiry, indicating that he felt defendant was "involved" in the burglary, defendant's affirmative response was significantly inculpatory. The cat was sufficiently out of the bag to exert a coercive impact on defendant's later admissions. It was error not to suppress the typewritten confession.[3]

Reversed and remanded for new trial.

GILLETTE, P. J., concurring.

I join in the opinion of the court, which I believe is compelled by *State v. Wolfe*, 61 Or App 409, ___ P2d ___ (1983) and *State v. Mendacino*, 288 Or 231, 603 P2d 1376 (1979). I write separately to add two observations.

1. I regret the introduction of the metaphor of an escaping feline ("the cat is out of the bag") into our legal lexicon. I recognize that it is a piece of literary cleverness from relatively ancient judicial roots (*United States v. Bayer*, 331 US 532, 540, 67 S Ct 1394, 91 L Ed 1654 (1947)), but mere age does not make it worthy. The fact is that we have used the metaphor as a short-hand description of a particular psychological phenomenon—a prisoner's lowered resistance to confessing a second time, once a first confession has been given—to the extent that we now seem to think that this phenomenon must occur in every case. The metaphor now rules where analysis was once sovereign. However, the overthrow occurred too long ago for a dissent to serve any purpose now, so I concur.

[3] Defendant also assigns error to the denial of his motion to strike certain evidence as uncorroborated testimony of an accomplice. Uncorroborated accomplice testimony is not inadmissible. It is only insufficient by itself to support a conviction. ORS 136.440(1). The trial court therefore correctly denied defendant's motion to strike. Defendant does not assign as error the trial court's denial of his motion for a judgment of acquittal.

2. Law enforcement authorities should take a hint: delaying service of a warrant in order to get a defendant to confess may seem cute or even useful, but it is counter-productive. The present state of the law seems to be that a defendant in such a case is best served if he responds to prearrest questioning, because doing so immunizes him from later effectively waiving his *Miranda* rights. A number of confessions are going to be lost from the bag, right along with the cat, unless this police practice is changed.

Appendix B

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	
	)	
Plaintiff-Respondent,	)	ORDER
	)	
v.	)	CA A24659
	)	SC 29521
MICHAEL JAMES ELSTAD,	)	
	)	
Defendant-Appellant.	)	

This matter is before the court upon Respondent's petition for review of the decision of the Court of Appeals in the above-entitled cause.

IT IS HEREBY ORDERED that the petition for review is denied.

DATE: September 7, 1983.

[Signature omitted in printing.]